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No. 96-827

Supreme Court, U.S.

FILED

AUG 14 1997

CLERK

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1997

LEONARD ROLLON CRAWFORD-EL,
Petitioner,

v.

PATRICIA BRITTON, ET AL.,
Respondents.

On Writ of Certiorari to the
United States Court of Appeals
for the District of Columbia Circuit

BRIEF OF THE AMERICAN CIVIL LIBERTIES
UNION AND THE AMERICAN CIVIL LIBERTIES
UNION OF THE NATIONAL CAPITAL AREA
AS *AMICI CURIAE*
IN SUPPORT OF PETITIONER

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August 14, 1997

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INTEREST OF *AMICI CURIAE*¹

The American Civil Liberties Union ("ACLU") is a nationwide, nonprofit, nonpartisan organization with nearly 300,000 members that, since its founding in 1920, has been devoted to protecting the constitutional rights and civil liberties of all Americans. Toward that goal, the ACLU has frequently represented individuals in *Bivens* and § 1983 actions seeking damages against government officials who have violated their rights. The American Civil Liberties Union of the National Capital Area is the Washington, D.C., affiliate of the ACLU and has been involved in many cases involving claims against government officials for violations of constitutional rights.

Indeed, both the ACLU and its affiliates have been involved in some of the leading cases setting the legal standards for such actions, both as direct counsel and as *amicus curiae*, including *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), and *Nixon v. Fitzgerald*, 457 U.S. 731 (1982).

STATEMENT OF THE CASE

Petitioner is a District of Columbia prisoner who sued the respondent D.C. prison guard for damages, alleging -- with circumstantial evidentiary support -- that the guard violated his First Amendment rights by causing several boxes of his belongings, including active legal papers, to be misdelivered in retaliation for his statements to the press, his filings of grievances and lawsuits, and his assistance to other prisoners in filing grievances.

¹ Letters of consent to the filing of this brief have been lodged with the Clerk of the Court pursuant to Sup. Ct. R. 37.3(a).

The district court dismissed the complaint because it did not meet the D.C. Circuit's now-abandoned requirement that a plaintiff must plead "specific direct evidence of [the defendant's unlawful] intent." Pet. App. Sec. 128a. The court of appeals, rehearing the case *en banc*, abandoned the "direct evidence" requirement, vacated the dismissal, and remanded the case for further proceedings.

Although its decision was fractured, a majority of the lower court ruled that a plaintiff in an unconstitutional motive constitutional tort case must establish the defendant's unconstitutional motive by clear and convincing evidence both at summary judgment and at trial. It is arguable that a majority of the court also ruled that in order to postpone decision on a defendant's pre-discovery motion for summary judgment under Fed. R. Civ. P. 56(f), a plaintiff in such a case must show more concretely than plaintiffs in all other cases that discovery is likely to lead to evidence that will prove the plaintiff's case by clear and convincing evidence.

SUMMARY OF ARGUMENT

In *Harlow v. Fitzgerald*, 457 U.S. 800 (1982) and subsequent cases, the Court struck a careful balance between the rights of individuals to vindicate their constitutional rights in *Bivens* and § 1983 cases, and the rights of government officials to be protected from meritless lawsuits. Government officials enjoy a qualified immunity in these cases, but individuals who overcome this immunity may pursue their claims consistent with the normal pleading, discovery, and summary judgment standards set forth in the Federal Rules of Civil Procedure.

The decision below upsets this carefully wrought balance. A majority of the judges properly concluded that the district court should determine on remand whether the plaintiff could

make a sufficient showing under Rule 56(f) of the Federal Rules of Civil Procedure to obtain discovery before responding on the merits to the defendants' motion for summary judgment. However, several of the opinions also suggest that special, more restrictive summary judgment and discovery rules should apply in civil rights cases involving unconstitutional motive, *see Crawford-El v. Britton*, 93 F.3d 813, 819 (D.C. Cir. 1996) (Williams, J.), 833-34 (Silberman, J., concurring), 841 (Ginsburg, J., concurring). That approach is irreconcilable with the Federal Rules and with the policies underlying *Bivens* and §1983 cases.

In *Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit*, 507 U.S. 163, 166-67 (1993), this Court made clear that the federal courts have no authority to alter the Federal Rules of Civil Procedure for particular categories of cases, whether at the pleading stage (as in *Leatherman*) or at the discovery and summary judgment stage (as here). Like plaintiffs in all other civil suits, *Bivens* and §1983 plaintiffs who have made "specific, nonconclusory factual allegations" in a Rule 56(f) affidavit are entitled to a reasonable opportunity to conduct discovery. *See Siegert v. Gilley*, 500 U.S. 226, 235 (1991) (Kennedy, J., concurring in the judgment).

Additionally, a majority below held that even plaintiffs who can prove by a preponderance of the evidence that defendants violated their clearly established constitutional right to be free from unconstitutionally motivated governmental action should be denied a damages remedy. The unprecedented "clear and convincing evidence" standard that the majority fashioned would preclude recovery in substantial cases, contrary to the purpose of the qualified immunity doctrine, which is to protect government employees only from insubstantial cases, *see Harlow*, 457 U.S. at 819 n.35, and contrary to the constitutional design that

values individual rights at least as much as the convenience of government employees.

Part I of this brief demonstrates that the current qualified immunity rules, combined with a fair application of the Federal Rules of Civil Procedure, provide sufficient protection to shield government officials from meritless cases. The balance should not be shifted in defendants' favor without a solid demonstration -- absent in this record -- that frivolous cases are resulting in significant discovery and unnecessary trials and that an expanded immunity defense is both necessary and tailored to prevent such abuse. Part II shows that extraordinary restrictions on the ability of *Bivens* and § 1983 plaintiffs to obtain discovery and resist summary judgment do not meet this standard because they would violate the Court's precedents rejecting *ad hoc* amendments to the Federal Rules, and they would create unjustified obstacles to vindication of clearly established constitutional rights. Part III establishes that the "clear and convincing evidence" standard would transgress basic constitutional values and settled legal standards.²

² This brief does not address the second Question Presented, which asks whether a government official should be immune "if she *asserts* a legitimate justification" for her action, even if the evidence clearly shows the real reason was an unconstitutional one. Pet. at i (emphasis added). In the court of appeals, only Judge Silberman advanced this rule, and neither the District of Columbia nor the United States as *amicus* supported it. Such a rule would be inconsistent with *Waters v. Churchill*, 511 U.S. 661, 684 (1994) (Souter, J., concurring) ("A public employer who did not really believe that the employee engaged in disruptive or otherwise punishable speech can assert no legitimate interest strong enough to justify chilling protected expression."), and it would also be inconsistent with the prevailing view in other circuits, *see, e.g., Sheppard v. Beerman*, 94 F.3d 823, 827 (2d Cir. 1996). Moreover, such a rule would essentially cloak government officials with absolute -- rather than qualified -- immunity in cases where liability turns on motive. By definition, (continued...)

ARGUMENT

I. A STRONG JUSTIFICATION IS REQUIRED FOR ANY ADDITIONAL RESTRICTIVE CONDITIONS ON THE ABILITY TO RECOVER DAMAGES FOR VIOLATIONS OF CLEARLY ESTABLISHED CONSTITUTIONAL RIGHTS

The qualified immunity available to government officials, coupled with a fair application of the Federal Rules of Civil Procedure, protects government officials from meritless *Bivens* and § 1983 lawsuits, while permitting victims of governmental overreaching to vindicate their individual constitutional rights. See *Harlow*, 457 U.S. at 819 n.35. The goal of qualified immunity is not to insulate officials from all liability, but only to protect them from the burdens of *insubstantial* lawsuits: “‘insubstantial’ suits against high public officials should not be allowed to proceed to trial.” *Id.* (internal citations omitted). The qualified immunity created by *Harlow* prevents plaintiffs from proceeding without alleging violations of clearly established constitutional rights, and the Federal Rules of Civil Procedure enable defendants to block discovery or trial by plaintiffs who have concocted claims without any adequate factual basis. These protections save government officials from the burden of litigating meritless claims and allow them to exercise the discretion necessary to do their jobs.

Any claim that these protections should be significantly expanded requires, at the very least, a showing that the existing

²(...continued)

the “objective” facts in such cases also are consistent with a lawful motive or intent, and the official (with the help of her government lawyers) could articulate, *post hoc*, a constitutional reason for her action.

rules are not adequate to protect government employees from meritless lawsuits. No such showing has been made. The interests of individuals in obtaining effective relief for violations of clearly established constitutional rights are no less worthy of protection than the interests of government officials. Plaintiffs in *Bivens* and § 1983 lawsuits already face substantial, unique burdens in prosecuting their claims. Any rule that makes it more difficult for plaintiffs to prevail will have the effect of precluding recovery in meritorious cases. See *Crawford-El* at 839 (Ginsburg, J., concurring). As a result, there is no basis for even considering an expansion of the qualified immunity defense without a solid demonstration that frivolous cases are resulting in significant discovery and unnecessary trials, and that an expanded defense is reasonably tailored to prevent such abuse.

A. An effective damages remedy is essential for violations of clearly established constitutional rights by government officials, including those who act from unconstitutional motives.

Effective protection of constitutional rights and individual liberties is at the core of the American constitutional system. That is why Congress created a damages remedy under 42 U.S.C. § 1983 for individuals whose federal constitutional or statutory rights are violated under color of state law, and why this Court recognized the right to a damages remedy when federal officials violate the constitutional rights of individuals. “In situations of abuse of office, an action for damages may offer the only realistic avenue for vindication of constitutional guarantees.” *Harlow*, 457 U.S. at 814. In many of these cases, “it is damages or nothing.” *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388, 410 (1971). The need for an effective remedy is particularly urgent because a government “agent acting -- albeit unconstitutionally -- in the name of the

United States possesses a far greater capacity for harm than an individual . . . exercising no authority other than his own." *Bivens*, 403 U.S. at 392. Without a meaningful remedy, these constitutional rights would be rendered meaningless.

Not only does a damages remedy provide relief to victims of constitutional violations, but it also holds government employees and employers accountable and deters unconstitutional behavior. Because governments often indemnify employees in these cases (*see* page 11, *infra*), the damages remedy gives federal, state and local governments themselves incentives to establish policies and practices to ensure that employees comply with clearly established constitutional principles, especially where no waiver of sovereign immunity has occurred. Removing the restraining effect of *Bivens* and § 1983 suits would risk substantial "unconstitutional mischief." *Crawford-El*, 93 F.3d at 840 (Ginsburg, J., concurring). To vindicate rights and discourage violations, therefore, it is essential to preserve an effective constitutional damages remedy against government officials who violate clearly established constitutional rights.

The availability of a remedy is no less important when the constitutional claim turns on the motives of governmental defendants than on their conduct. In a wide variety of circumstances, clearly established constitutional principles prohibit governments from taking adverse action against individuals for unconstitutional reasons. Denying the only meaningful remedy of damages in these cases would give government officials what amounts to a license to violate these clearly established constitutional rights.

One group of individuals who would be severely impacted by unwarranted curtailment of unconstitutional motive cases

consists of actual and prospective government employees. Government employees are protected from demotion, firing or other retaliation because of race, gender, age, religion, political affiliation or expression, or other improper reasons, and applicants for government employment are also protected from such discrimination. *E.g.*, *Washington v. Davis*, 426 U.S. 229 (1976) (race); *Davis v. Passman*, 442 U.S. 228, 231 (1979) (gender); *Branti v. Finkel*, 445 U.S. 507 (1980) (political affiliation); and *Rankin v. McPherson*, 483 U.S. 378 (1987) (protected speech). Likewise, government contractors are protected from government officials acting for unconstitutional reasons. *E.g.*, *Board of County Comm'rs v. Umbehr*, 116 S. Ct. 2342 (1996) (civil remedy available to independent contractors terminated for constitutionally protected speech). These clearly established constitutional rights would be nullified if government employees and contractors could not effectively pursue motive-based suits to discovery and trial.

Other categories of individuals have an equal need for damages remedies to vindicate their clearly established constitutional rights to be free from unconstitutionally motivated government action. Beneficiaries and potential beneficiaries of a broad range of governmental programs are protected from unconstitutionally motivated governmental action. *E.g.*, *Romer v. Evans*, 116 S. Ct. 1620 (1996) (denial of government protection from discrimination); *Village of Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252 (1977) (denial of zoning changes); *Weinberger v. Weisenfeld*, 420 U.S. 636, 645 (1975) (denial of Social Security benefits); *Department of Agric. v. Moreno*, 413 U.S. 528 (1973) (denial of food stamps); *Shapiro v. Thompson*, 394 U.S. 618, 627 n.6 (1969) (denial of welfare payments); and *Speiser v. Randall*, 357 U.S. 513 (1958) (denial of tax exemptions). Moreover, the Constitution bars government officials from interfering with voting and speech

rights because of political or religious views or because of sex, race, or other status. *E.g.*, *City of Mobile v. Bolden*, 446 U.S. 55 (1980). Those under the care and supervision of the government, such as patients in public institutions and prisoners, also receive constitutional protection. For instance, the Constitution protects them from retaliation for the exercise of their First Amendment rights, and patients and prisoners subjected to inhumane institutional conditions or denied medical treatment deserve compensation if they can prove "deliberate indifference" on the part of an institution's employees. *E.g.*, *Wilson v. Seiter*, 501 U.S. 294 (1991) (inhumane prison conditions); *Estelle v. Gamble*, 429 U.S. 97 (1976) (denial of medical treatment). In addition, it is well-settled that the government may not make prosecutorial decisions for unconstitutional reasons, such as the desire to suppress protected speech. *E.g.*, *Wayte v. United States*, 470 U.S. 598 (1985) (selective prosecution).

Because the rights protected are so fundamental, demands for additional restrictions on cases alleging unconstitutionally motivated violations of clearly established constitutional rights should be carefully and skeptically scrutinized.

B. Government officials facing constitutional tort claims do not need additional protection because they can rely on the reasonable and significant safeguards already in place.

Plaintiffs alleging constitutional torts already face significant barriers to recovery designed to protect defendants from insubstantial claims, and these restrictive rules have achieved their intended purpose. Any further limitations would disrupt the balance established in *Harlow* and subsequent cases at the

expense of meritorious lawsuits alleging violations of clearly established constitutional rights.

Qualified immunity itself restricts the claims plaintiffs can bring. Under *Harlow*, plaintiffs suing government officials for civil damages must allege a violation of a clearly established constitutional or statutory right or face an immediate adverse judgment, either on a motion to dismiss or a motion for summary judgment. This standard protects defendants from having to go through discovery and trial even if the plaintiff's factual allegations are true and even if defendants in fact behaved unconstitutionally, so long as the constitutional guidelines were not clearly established at the time of defendant's action. *See Harlow*, 457 U.S. at 818 ("If the law at that time was not clearly established, an official could not reasonably be expected to anticipate subsequent legal developments, nor could he fairly be said to 'know' that the law forbade conduct not previously identified as unlawful."). Moreover, defendants asserting qualified immunity can bring an interlocutory appeal, notwithstanding the delay resulting from such an appeal. Defendants can immediately appeal unfavorable decisions on immunity (denials of motions to dismiss or for summary judgment), so long as they are based on a question of law rather than fact. *Johnson v. Jones*, 515 U.S. 304, 310 (citing *Mitchell v. Forsyth*, 472 U.S. 511 (1985)); *Behrens v. Pelletier*, 116 S. Ct. 834, 841 (1996) (rejecting rule that defendant claiming qualified immunity can bring only one interlocutory appeal on immunity issue).

Government employees can also force plaintiffs to adduce reasonably specific evidence of unconstitutional motive before plaintiffs may proceed to trial or even discovery. The procedural device usually employed by defendants in these cases is a pre-discovery motion for summary judgment. *See Kit Kinports, Qualified Immunity in Section 1983 Cases: The Unanswered*

Questions, 23 Ga. L. Rev. 597, 652 (1989). Faced with a summary judgment motion, plaintiffs have two options: Either they must produce specific, admissible evidence sufficient to carry their burden of proof at trial; or they must produce sufficient evidence to justify discovery. Plaintiffs who claim to need discovery to respond on the merits to summary judgment motions are not entitled to discovery as a matter of right or based on a general allegation that government officials operated with improper motives. Rather, they must demonstrate under Rule 56 that discovery is likely to provide information needed to support their claim. See *Siebert v. Gilley*, 500 U.S. 226, 235 (1991) (Kennedy, J., concurring in the judgment). This standard effectively screens out insubstantial cases and spares defendants the burdens of discovery and trial. See page 21, *infra*.

Even after discovery, plaintiffs face a substantial burden to defeat summary judgment on the merits. Although the Court in *Harlow* was concerned about defendants' difficulties in obtaining summary judgment in unconstitutional motive cases, "subsequent clarifications to summary-judgment law have alleviated that problem." *Wyatt v. Cole*, 504 U.S. 158, 171 (1992) (Kennedy, J., concurring). There is less, not more, reason today than when *Harlow* was decided to go beyond "firm application" of the Federal Rules to weed out meritless claims. *Harlow*, 457 U.S. at 808. Rule 56(c) requires plaintiffs to present evidence that creates a genuine dispute about a material fact and is sufficient to support a jury verdict in their favor on that issue. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249-50 (1986). A party loses at summary judgment if the party "fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). These Rule 56 standards give government officials faced with insubstantial claims that they acted with

unconstitutional motives ample opportunity to obtain summary judgment and make it highly unlikely that meritless lawsuits will survive to interfere with their job-related duties.

Constitutional claims need not and should not be singled out for disparate treatment simply because the clearly established constitutional rights at issue involve not only what governmental employees did but why they did it. Motive or intent is a factual issue, and claims that turn on these facts should be subject to the same substantive and procedural standards as other kinds of claims. The qualified immunity standard need not change because a claim against a government official is based on motive. *Harlow* requires an objective inquiry only into whether the plaintiff has alleged a violation of a clearly established constitutional right. 457 U.S. at 818-19. This objective inquiry does not depend on the substantive merits of the case because qualified immunity is "distinct from the merits." *Behrens*, 116 S. Ct. at 839. "[A]lthough sometimes practically intertwined with the merits, a claim of immunity nonetheless raises a question that is significantly different from the questions underlying plaintiff's claim on the merits." *Johnson v. Jones*, 515 U.S. 304, 314 (1995). As long as the constitutional right at issue is clearly established, it should be irrelevant, for immunity purposes, whether the factual dispute involves motive or some other contested issue.

That is true notwithstanding the claim that motive is "easy to allege and hard to disprove." *Crawford-El*, 93 F.3d at 821 (Williams, J.). Indeed, that aphorism is entirely misplaced here because in *Bivens* and § 1983 cases, the burden is not on defendants to disprove the plaintiffs' allegations, but on the plaintiffs to prove them. More important, the assertion is simply incorrect. Unconstitutional motive cases are hard cases to bring and to win in the best of circumstances. The governmental

action that gives rise to the claim, by definition, is not inherently unconstitutional. Unless their defenses are insubstantial, defendants can identify objective, verifiable factors justifying their decision to act as they did. Plaintiffs virtually never have direct evidence of unconstitutional motive, *see Elliott*, 937 F.2d at 345, and plaintiffs typically must build a case relying on circumstantial evidence sufficient to create a genuine factual dispute and to negate defendants' evidence of legitimate reasons for the actions they took.³

Two recent decisions by the Court support the proposition that constitutional tort cases should not end with summary judgment and without discovery when genuine factual disputes exist, including those involving motive. In *Johnson v. Jones*, the Court held that qualified immunity decisions made at the summary judgment stage are immediately appealable, but only if they turn on the legal issue of whether a constitutional right is clearly established. 515 U.S. at 316. If the denial of immunity is based on a factual determination, then the relevant facts must be determined at trial, and only after trial could the defendant official appeal the determination about qualified immunity. The Court recognized that the resolution of a governmental defendant's "I didn't intend it" defense was a factual determination -- the same as the resolution of an "I didn't do it" defense. *Id.* ("Many constitutional tort cases . . . involve factual controversies about, for example, intent."). The Court understood that the lack of appealability means that denials of defendants' motions for summary judgment based upon genuine disputes

³ If the defendant submits an affidavit in support of a summary judgment motion stating that she acted for constitutionally permissible reasons, the plaintiff must produce admissible evidence that her motives were illegal, and the plaintiff cannot rely on generalized attacks on the defendant's credibility or a claim that the affidavit is self-serving. *See Liberty Lobby*, 477 U.S. at 256-57.

about the material fact of the defendants' intent would go to trial. *See* 515 U.S. at 316 ("We recognize that . . . a district court's denial of summary judgment . . . forces public officials to trial"). But the interest in shielding defendants from discovery or trial in insubstantial cases does not justify extraordinary restrictions where plaintiffs have specific, genuine factual grounds for their claims, nor does it warrant exceptions to procedural and discovery requirements that the Federal Rules intend to apply in all kinds of cases.

Waters v. Churchill, 511 U.S. 661 (1994), represents a straightforward application of this approach. The Court reversed entry of summary judgment for a governmental employee in a § 1983 case and remanded it for a determination of whether the plaintiff had been fired because of her potentially protected statements or for some other reason. *Id.* at 681. The plaintiff had "produced enough evidence to create a material issue of disputed fact about petitioners' actual motivation." *Id.* The ruling in *Waters* has not led to a deluge of frivolous § 1983 and *Bivens* cases.⁴

Waters also illustrates that the Court has narrowly tailored to particular problems any limitations on recovery in constitutional tort cases. Concerned that governments retain reasonable flexibility to manage their work forces, the Court held that governmental employees accused of taking adverse personnel action based on protected speech are not liable if they acted reasonably based on the information available to them, even if

⁴ The Court in *Waters* did not apply a clear and convincing evidence standard to determine whether the plaintiff had produced enough evidence to survive summary judgment; thus, the D.C. Circuit's decision to heighten the burden of proof in unconstitutional motive cases, as discussed at page 19, *infra*, also is inconsistent with *Waters*. 511 U.S. at 681.

a jury could later conclude that the information was incorrect. *Waters*, 511 U.S. at 667. No sweeping change in evidentiary burdens or standards was necessary or appropriate to deal with this limited issue.

Finally, separate statutory protections for government officials sued because of actions undertaken in their official capacity significantly reduce any risk that constitutional cases will unduly interfere with governmental operations and employment policies. Restrictions on constitutional cases against governmental officials are intended to avoid any inordinate chill of their willingness to do their jobs and unwarranted problems in recruiting and retaining qualified, responsible employees. See *Harlow*, 457 U.S. at 814. In fact, civil rights suits usually do not threaten the personal financial resources of government employees. Under federal and state indemnification statutes, governments generally provide attorneys to employees involved in such suits, and indemnify many damage awards entered against employees. E.g., *Young v. Selsky*, 41 F.3d 47, 52 (2d Cir. 1994) (little personal risk to defendant in § 1983 suit because representation was provided by state attorney general, and employee would be indemnified by state for any damages unless resulting from intentional wrongdoing); see generally *Board of County Comm'rs v. Brown*, 117 S. Ct. 1382, 1404 (1997) (Breyer, J., dissenting) (collecting state statutes); William P. Kratzke, *Some Recommendations Concerning Tort Liability of Government and Its Employees for Torts and Constitutional Torts*, 9 Admin. L.J. Am. U. 1105, 1174 n.408 (1996) (collecting federal statutes). Indemnification statutes alleviate the concern that civil rights suits deter people from entering public service because they enable government employees "to perform their functions free of the potential for financial loss suffered as a result of their job-related pursuits." 63C Am. Jur. 2d *Public Officers and Employees* § 407 (1997). Any limited residual

personal risk to governmental employees does not justify expanding the already substantial restrictions on individuals seeking remedies for violations of clearly established constitutional rights.

No showing has been made that the current qualified immunity rules unreasonably expose government officials to meritless claims. Proponents of expanding qualified immunity have not demonstrated that motive-based claims are more likely to be meritless or more likely to escape existing protections against frivolous lawsuits. The goal of qualified immunity, after all, is only to protect government officials from the burdens of *meritless* lawsuits. *Harlow*, 457 U.S. at 819 n.35. No evidence demonstrates that existing rules are inadequate to meet this goal. Nor does any evidence indicate that most or even many constitutional tort claims turn on the motives of government officials, or that motive-based claims are more likely to go to trial than others.⁵ Without a demonstration that frivolous claims

⁵ To the extent that the concern is with lawsuits brought by prison inmates, as one of the opinions below seems to suggest, see *Crawford-El*, 93 F.3d at 830 (Silberman, J., concurring), there has been no showing that prisoners have filed any significant portion of the cases alleging unconstitutional motive. Prisoner civil rights cases often do not depend on the motives of prison guards or administrators. For instance, an inmate may sue for a procedural due process violation when facing disciplinary action without a hearing, or he may allege unjustified interference with his religious practices if not permitted to pray when he wishes. These cases do not turn on whether the motives of the government decision-maker were good or bad, and any alleged difficulties in weeding out insubstantial cases alleging unconstitutional motive (difficulties that are, at a minimum, easy to overstate -- see page 14, *supra*) do not apply. Furthermore, the percentage of prisoner civil rights cases that go to trial is no higher than the percentage of all civil cases that go to trial in federal district courts. Administrative Office of the United States Courts, *Judicial Business of the United States Courts: 1996 Report of the Director*, Table C-4, at 159-60 (1997). Although the number of prisoner civil rights

(continued...)

based on unconstitutional motive are clogging the courts and preventing government officials from doing their jobs, their immunity need not and should not be expanded.

II. FAIR APPLICATION OF THE FEDERAL RULES OF CIVIL PROCEDURE AMPLY PROTECTS GOVERNMENT OFFICIALS FROM UNJUSTIFIED DISCOVERY

The Federal Rules of Civil Procedure give district judges ample discretion to limit the scope of discovery and to prevent unjustified or unduly burdensome discovery. To the extent any of the opinions below suggest that special and even more restrictive discovery rules should apply in *Bivens* and §1983 cases involving unconstitutional motive, see *Crawford-El*, 93 F.3d at 819 (Williams, J.), 833-34 (Silberman, J., concurring), 841 (Ginsburg, J., concurring),⁶ that suggestion should be rejected as inconsistent with the Federal Rules and with the

³(...continued)

cases has increased by approximately one-third in the last five years, *id.* at 139, the number of prisoners has grown by the same rate in that period. Christopher J. Mumola & Allen J. Beck, *Bureau of Justice Statistics Bulletin*, "Prisoners in 1996" (June 1997).

⁶ Judge Williams recommended that a plaintiff lose at summary judgment "unless, prior to discovery, he offers specific, non-conclusory assertions of evidence, in affidavits or other materials suitable for summary judgment, from which a fact finder could infer the forbidden motive." *Crawford-El*, 93 F.3d at 819 (emphasis added). Judge Silberman advocated his own rule that defendants prevail at summary judgment if able to assert any objectively reasonable basis for their actions, but he also suggested that among the other opinions, he most supported Judge Williams' approach to the discovery issue. *Id.* at 833. It is somewhat unclear whether Judge Ginsburg supported a heightened discovery standard, although the Solicitor General believes he does, as discussed at page 23 n.9, *infra*.

policies underlying *Bivens* and §1983 cases. There is no adequate justification for adopting any standard other than the existing Federal Rules of Civil Procedure applicable to discovery. Plaintiffs in *Bivens* and §1983 cases should not face a unique and unfair obligation to be, in effect, ready for trial even before they file lawsuit.

The standard applicable to discovery in *Bivens* and §1983 cases can have an enormous practical impact. As then-Judge Ginsburg explained, "[a]llowing plaintiffs to raise certain claims of unconstitutional motive could become an empty gesture were we to impose a blanket restriction on *all* discovery prior to the resolution of the qualified immunity issue on summary judgment." *Martin v. D.C. Metropolitan Police Dept.*, 812 F.2d 1425, 1437 (D.C. Cir. 1987). Because the best evidence concerning the motivation of governmental officials is often within the control of the government, plaintiffs in cases such as these need a reasonable opportunity for discovery in order to have a fair chance to carry their burden of proof. Severe limits on the ability of plaintiffs to obtain evidence that the purported justification for governmental action is pretextual would, as a practical matter, all but preclude recovery, despite the clearly established nature of the constitutional rights at stake and the lack of any alternative remedy for victims of government wrongdoing.

A. The Federal Rules cannot be modified on an *ad hoc* basis.

As an initial matter, the federal courts have no authority (outside the process created by the Rules Enabling Act, 28 U.S.C. §§ 2071-77) to alter the Federal Rules of Civil Procedure for particular categories of cases. This Court has held that the Federal Rules mean what they say, and judicial alteration of

those rules is unwarranted. *Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit*, 507 U.S. 163, 166-67 (1993) (striking down heightened pleading standard for certain §1983 cases). If alteration of the Federal Rules is warranted, it must be accomplished by "amending the Federal Rules, and not by judicial interpretation. In the absence of such an amendment, federal courts must rely on summary judgment and control of discovery to weed out unmeritorious claims." *Id.* at 167.

This principle is as dispositive in the context of discovery standards as in the context of the pleading standards at issue in *Leatherman*. The Federal Rules provide a comprehensive framework for regulating discovery and adjudicating summary judgment motions. Federal courts therefore may not devise special rules for *Bivens* and § 1983 cases that do not apply to other categories of cases.

B. The Federal Rules give district judges broad authority to limit or deny discovery in appropriate cases.

Even if the federal judiciary were empowered to amend the Federal Rules and impose a different discovery standard on plaintiffs in unconstitutional motive cases, there would be no need to do so. The federal rules already protect government officials from insubstantial unconstitutional motive claims.

Under Rule 56(f), a trial court has broad discretion to control discovery at the summary judgment stage. When a plaintiff is faced with a summary judgment motion filed before she has had the opportunity to take discovery, she can file an affidavit setting out the need for discovery. If the plaintiff can set forth "specific, nonconclusory factual allegations," the trial

court typically should allow the plaintiff to proceed with at least limited discovery before ruling on the summary judgment motion.⁷ *Siebert*, 500 U.S. at 23 (Kennedy, J., concurring in the judgment); *see also id.* at 247 (Marshall, J., dissenting); *Celotex Corp. v. Catrett*, 477 U.S. 317, 326 (1986) (Rule 56(f) allows a summary judgment motion to be denied or continued "if the non-moving party has not had an opportunity to make full discovery"); *Liberty Lobby*, 477 U.S. at 250 n.5 (summary judgment should ordinarily be denied when the nonmoving party "has not had the opportunity to discover information that is essential to his opposition"); *Elliott v. Thomas*, 937 F.2d 338 (7th Cir. 1991); *Pueblo Neighborhood Health Centers v. Losavio*, 847 F.2d 642, 649 (10th Cir. 1988). To do otherwise would preclude any meaningful prosecution of even the most meritorious case -- a plaintiff would be destined to lose on summary judgment unless she already had sufficient evidence to bring the case to a jury before any discovery was even taken.

This does not, however, mean that plaintiffs are free to conduct intrusive discovery even when their claims are insubstantial. If a plaintiff cannot show "a reasonable likelihood that additional discovery will uncover evidence to buttress the claim," the trial court has broad discretion to limit discovery appropri-

⁷ Rule 56(f) does not require a plaintiff opposing a pre-discovery summary judgment motion to possess at the outset of the case evidence sufficient to support a favorable jury verdict. If she already possesses the facts "essential to her opposition," invocation of Rule 56(f) would be unnecessary, and she could defeat summary judgment outright under Rule 56(c). The requirement that a *Bivens* plaintiff produce specific, nonconclusory factual allegations in response to a pre-discovery summary judgment motion is less demanding than the requirement imposed by Rule 56(c) of admissible evidence sufficient to carry the burden of proof at trial. *Branch v. Tunnell*, 937 F.2d 1382, 1387-88 (9th Cir. 1991), *cert. denied*, 114 S.Ct. 2704 (1994). The showing that a plaintiff must make to get discovery is less than the showing necessary to defeat summary judgment and get to trial.

ately or deny discovery altogether. *Crawford-El*, 93 F.3d at 849 (Edwards, J., concurring in the judgment); *see also Siegert*, 500 U.S. at 235 (Kennedy, J., concurring in the judgment); *id.* at 247 (Marshall, J., dissenting); *Celotex*, 477 U.S. at 326; *Liberty Lobby*, 477 U.S. at 250 n.5. Rule 56(f) requires a plaintiff to present in an affidavit a "plausible basis for a belief that discoverable materials exist" that would be likely to raise a genuine issue of material fact. *Resolution Trust Corp. v. North Bridge Assocs.*, 22 F.3d 1198, 1206 (1st Cir. 1994). The party resisting summary judgment must identify specific facts that she expects to obtain through discovery, explain how discovery is likely to lead to those facts, and show that those facts are likely to create a factual question properly resolved at trial. *See* 6 James W. Moore, *Moore's Federal Practice*, ¶ 56.24, at 56-811 (2d ed. 1996 & Supp. 1997).⁸ If the plaintiff cannot provide some specific support for general factual allegations in her complaint, summary judgment is properly granted at that point, allowing the government official to avoid the burdens associated with full scale litigation. *See Elliott v. Thomas*, 937 F.2d 338, 345 (7th Cir. 1991) ("Unless the plaintiff has the kernel of a case in hand, the defendant wins on immunity grounds in advance of discovery.").

The existing Federal Rules thus amply protect government officials from insubstantial cases, whether a case is based on

⁸ Adjudication of summary judgment motions before discovery raises particular problems when knowledge of the relevant facts "is exclusively with or largely under the control of the moving party." With a sufficient Rule 56(f) showing, the party opposing summary judgment should generally be given the opportunity to obtain those facts through discovery. 6 Moore, *supra*, ¶ 56.24, at 56-809; 10A Charles A. Wright, et al., *Federal Practice and Procedure*, § 2741, at 545 (2d ed. 1983 & Supp. 1997); *Resolution Trust Corp.*, 22 F.3d at 1208; *Glen Eden Hospital, Inc. v. Blue Cross and Blue Shield of Michigan, Inc.*, 740 F.2d 423, 427 (6th Cir. 1984).

unconstitutional motive or another claim. There is no need for the Court to alter the standard applicable to unconstitutional motive cases and adopt a "special discovery threshold." *On Pet. for Cert.*, Opp. Br. for United States at 9.⁹ Trial judges have the tools available to protect government officials from unmeritorious claims and are in the best position to determine, on a case by case basis, how to utilize those tools. "[A] district judge, whose experience with the management of discovery is far more extensive than [that of appellate judges], whose familiarity with the case and with the litigants is more immediate, and whose tools for controlling the course of litigation are more subtle and precise, is eminently qualified for this task." *Crawford-El*, 93 F.3d at 841 (Ginsburg, J., concurring). There is no reason to doubt that federal judges will perform this task responsibly, balancing the competing interests of plaintiffs seeking redress for violations of clearly established constitutional rights, and government employees faced with unnecessary or excessive discovery burdens. Trial judges can, and do, routinely limit discovery using the authority they possess under not only Rule 56(f) but also Rule 26(b) and (c). For example, a judge could limit discovery to issues going to the heart of the immunity question, and could restrict the number of depositions and interrogatories.

⁹ Judge Williams clearly endorses a heightened discovery standard in his opinion below, and Judge Silberman accepts Judge Williams' formulation as the next best option after his own, which would essentially obviate the need for any discovery. *See* page 19 n.6, *supra*. According to the Solicitor General, Judge Ginsburg's opinion in *Crawford-El* also advocated a heightened discovery standard. Judge Ginsburg would require the plaintiff to demonstrate a "reasonable likelihood, based upon specific evidence within the plaintiff's command, that discovery will uncover evidence sufficient to sustain a jury finding in the plaintiff's favor." *Crawford-El*, 93 F.3d at 841 (Ginsburg, J., concurring). Although it is not clear how drastically this formulation differs from the Federal Rules, the Court should decline to follow it to the extent that it raises the discovery threshold for unconstitutional motive cases.

The Court recently affirmed emphatically that federal judges can and should make these decisions based on the facts of individual cases. In *Clinton v. Jones*, 117 S. Ct. 1636 (1997), the Court rejected the claim that a sitting President is entitled to a stay of a civil lawsuit pending during his tenure in office. The Court understood the discovery and other litigation-related burdens that may be placed on a President embroiled in litigation while he attempts to carry out his official duties, but nonetheless held that it was within the discretion of individual district courts to weigh the competing interests on a case-by-case basis. Just as the Court has "confidence in the ability of our federal judges" to limit intrusive discovery in cases involving the President of the United States, *id.* at 1652, so can it trust trial judges to firmly apply the discovery rules in cases involving lower level government employees, such as the prison guard here.

III. REQUIRING VICTIMS OF CONSTITUTIONAL TORTS TO MEET AN EXTRAORDINARY STANDARD OF PROOF IS UNJUSTIFIED, UNNECESSARY, AND UNPRECEDENTED

The court below fashioned a clear and convincing evidence standard for plaintiffs whose clearly established constitutional rights are violated by governmental officials acting with an improper motive, even though neither party nor the Solicitor General advocated this standard and no other court has adopted it. There is no basis to single out these plaintiffs for this extraordinary burden -- a burden that would apply both at the summary judgment stage and at trial where any interest of government officials in not being tried no longer applies.

A "clear and convincing" evidentiary standard would not further the purpose of the qualified immunity doctrine to nip in the bud "insubstantial" suits against government officials. *See*

Harlow, 457 U.S. at 819 n.35. By any measure, a case is substantial if the plaintiff can prove by a preponderance of the evidence that the defendant violated her clearly established right to be free from unconstitutionally motivated governmental action. The "clear and convincing" standard would prevent these plaintiffs from obtaining any redress. Individuals who produce specific, admissible evidence sufficient to demonstrate that their clearly established constitutional rights were more likely than not violated by government officials motivated by antagonism to their sex, age, race, religion, political allegiance, views, or other illegitimate factors should be allowed to proceed to trial and to recover damages.

A. A heightened evidentiary standard should be used to protect individual constitutional rights, not limit them.

A standard of proof "instruct[s] the factfinder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions for a particular type of adjudication," and also "serves as a societal judgment about how the risk of error should be distributed between the litigants." *Cruzan v. Missouri Dep't of Health*, 497 U.S. 261, 282-83 (1990) (internal quotations and citations omitted). "In cases involving individual rights, whether criminal or civil, the standard of proof at a minimum reflects the value society places on individual liberty." *Addington v. Texas*, 441 U.S. 418, 425 (1979) (internal quotations and citations omitted). Imposing an unusually demanding standard of proof in constitutional tort cases would proclaim that, in our society, constitutional rights of individuals are less important than the convenience of government employees. But the vindication of individual rights should hold a favored, not disfavored, place in the federal courts.

That is why courts have raised the standard of proof in constitutional cases only to protect, not limit, the vindication of individual rights, and only when more than monetary damages are at stake. "Exceptions to [the preponderance] standard are uncommon, and in fact are ordinarily recognized only when the government seeks to take unusual coercive action -- action more dramatic than entering an award of money damages or other conventional relief -- against an individual." *Price Waterhouse v. Hopkins*, 490 U.S. 228, 253 (1989). The court below turned this principle on its head. See *Crawford-El*, 93 F.3d at 822 (Williams, J.). The cases it invoked to protect the government from claims by individuals in fact imposed a heightened evidentiary standard to protect individuals from claims by the government. These cases include *Woodby v. Immigration and Naturalization Service*, 385 U.S. 276, 285 (1966) (clear and convincing evidence of grounds for deportation because of "drastic deprivations" resulting from erroneous decision); *Schneiderman v. United States*, 320 U.S. 118, 125 (1943) (clear and convincing evidence in denaturalization proceedings because "rights once conferred should not be lightly revoked"); *Addington v. Texas*, 441 U.S. 418, 425 (1979) (clear and convincing evidence standard in civil commitment proceedings because of possibility of "significant deprivation of liberty"); *Santosky v. Kramer*, 455 U.S. 745, 747 (1982) (clear and convincing evidence before a state "may sever completely and irrevocably the rights of parents in their natural child"); and *New York Times v. Sullivan*, 376 U.S. 254, 270 (1964) (clear and convincing evidence of actual malice in libel suits against public officials because of First Amendment protection of debate on public issues).¹⁰ It would be unjustified, and unprecedented, to apply

¹⁰ A clear and convincing evidence standard has been used in the civil context where quasi-criminal conduct is at issue, see *Crawford-El*, 93 F.3d at (continued...)

the clear and convincing evidence standard to benefit an alleged violator of the Constitution.

B. The same evidentiary standard should apply in unconstitutional motive cases against government officials as in analogous cases against government officials and the government itself.

Imposing an extraordinary evidentiary burden on individuals in cases involving violations of clearly established constitutional rights would be particularly anomalous because no such burden is imposed in civil cases asserting analogous statutory and tort claims against both governments and government officials. A "preponderance of the evidence" standard is the firmly settled norm in civil cases. See *Price Waterhouse*, 490 U.S. at 253; 9 *Wigmore on Evidence* § 2498. No general exception exists for cases against government officials motivated by illegal considerations. The "preponderance" standard applies in sex, age, and race discrimination cases whether the individual accusing of making employment decisions for the wrong reasons worked for a public or private employer. E.g., *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 506 (1993) (Title VII racial discrimination); *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 252-53 (1981) (Title VII gender discrimination); *Scaria v. Rubin*, No. 1072, 96-6211, 1997 WL 353288 (2d Cir. June 13, 1997) (ADEA and Title VII gender discrimination); *Roberts v.*

¹⁰(...continued)

822 (Williams, J.), but no equivalent reputational stigma attaches in § 1983 or *Bivens* cases involving damages claims against government employees. The justifications for a clear and convincing evidence standard in other contexts cited below (*id.*, citing 9 *Wigmore on Evidence* § 2498 (3d ed. 1940) with respect to lost wills and oral contracts to make bequests) also have no applications in § 1983 or *Bivens* damages cases.

National Health Corp., 963 F. Supp. 512, 516 (D.S.C. 1997) (ERISA benefits discrimination). A variety of statutes provide a remedy against federal and state governments, and a "preponderance" standard generally applies in those cases even though they expose government employees to discovery burdens and adverse personnel actions if liability is found. *E.g.*, *Budden v. United States*, 15 F.3d 1444, 1449 (8th Cir. 1994) (Federal Tort Claims Act).

The anomaly of imposing a "clear and convincing" standard in constitutional cases but a "preponderance" standard in statutory and tort cases is heightened because plaintiffs often join statutory and common law tort claims with their constitutional tort claims. Crawford-El himself, for example, has a state law conversion claim. *See Crawford-El*, 93 F.3d at 816 n.1; *see also Kimberlin v. Quinlan*, 774 F. Supp. 1 (D.D.C. 1991) (plaintiff sued prison officials under *Bivens*, Federal Tort Claims Act and federal wiretap law), *rev'd*, 6 F.3d 789 (D.C. Cir. 1993), *reh'g en banc denied*, 17 F.3d 1525 (D.C. Cir. 1994), *vacated and remanded*, 515 U.S. 321 (1995). Since government employees would still face discovery and other litigation-related burdens and risks resulting from the claims on which the plaintiff could proceed under a "preponderance" standard, it would make no sense to use a heightened evidentiary standard to prevent the plaintiff from proceeding on related *Bivens* and § 1983 claims.

Likewise, it would be incongruous for a plaintiff to bear a heavier evidentiary burden in a damages suit than an injunction suit. Plaintiffs do not have to overcome qualified immunity to gain injunctive relief against government officers. *See Crawford-El*, 93 F.3d at 831-32 (Silberman, J., concurring). Thus in suing for an injunction, plaintiffs need not present clear and convincing evidence in order to survive summary judgment and proceed to trial. In many cases, plaintiffs seek both

injunctive and monetary relief. Whether plaintiffs can assert a claim for monetary relief in addition to, or instead of, a claim for equitable relief is often merely a matter of chance -- depending on whether, for example, the defendant manager still supervises the plaintiff employee, or the defendant guard still oversees the plaintiff prisoner. The ability to proceed and prevail should not turn on such fortuity.

A "clear and convincing" standard in unconstitutional motive cases would not be effective in achieving its purported rationale. As explained above, it would preclude substantial claims, not just the insubstantial claims against which the qualified immunity defense is directed. Moreover, raising the evidentiary bar will often not reduce any litigation-related burdens borne by government employees, a primary concern for the qualified immunity established in *Harlow*, 457 U.S. at 814. The heightened evidentiary standard would apply only to claims against government employees for damages, and not to claims for injunctive relief against employees or to claims for damages from the government itself. *See page 29, supra*. The usual "preponderance" standard would apply to these other claims. In many cases, therefore, plaintiffs could proceed with discovery against, and call as trial witnesses, allegedly responsible government employees, even though they were not technically defendants in the case. The effect of the heightened burden would be not to alleviate the burden of litigation on government employees, but only to reduce opportunities to vindicate constitutional rights and to deter unconstitutional behavior.

CONCLUSION

For the reasons stated above, the judgment of the court of appeals, vacating the dismissal of petitioner's complaint and remanding the case for further proceedings, should be affirmed.

However, the ruling of the court of appeals that a plaintiff in an unconstitutional motive constitutional tort case must establish the defendant's unconstitutional motive by clear and convincing evidence both at summary judgment and at trial should be disapproved, and the Court should make it clear that the Federal Rules of Civil Procedure apply to govern discovery in such cases, just as they do in all others.

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August 14, 1997